(22)

In the Supreme Court of the United States

OCTOBER TERM, 1916

No. 296

CHARLES J. MEYER, Defendant in Error,

vs.

THE ARROW COMPANY,

Plaintiff in Error.

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In the Supreme Court of the United States

October Term, 1943.

CHARLES J. MACH, Debtor, *Petitioner,*

vs.

THE ABBOTT COMPANY, a Corporation, *Respondent.*

No. ———.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Charles J. Mach, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above-entitled cause on June 21, 1943.

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Preliminary Statement.

This case arose under the Frazier-Lempke Act and on appeal taken by the debtor, petitioner, from a decision of the District Court of the United States for the District of Nebraska, not officially reported, entered on May 29, 1942 (R. 118-122). The District Court in its order or judgment, without finding that all of the conditions set forth in Section 75(s)(1) of the Bankruptcy Act (11 U. S. C. A., Sec. 203 [s][1]) had been complied with, began the three-year stay period, provided under Section 75(s)(2) of the Bankruptcy Act (11 U. S. C. A., Sec. 203[s][2]), on March 22, 1940, the date the appraisal was filed, rather than on May 29, 1942, the date the order or judgment was entered. In addition, the District Court held that rentals began on October 27, 1938, under a previous ruling of the court, and as a result the debtor was delinquent in rentals. The debtor, petitioner, appealed from this order and judgment and the case came to the Circuit Court of Appeals for the Eighth Circuit. The judgment of the Eighth Circuit Court of Appeals rendered on June 21, 1943 (R. 136-144), affirmed the judgment or order of the District Court in retroactively beginning the three-year stay period on March 22, 1940, for the reason that the debtor had filed a motion before the District Court stating that the three-year stay period should begin on March 22, 1940, and as a result the debtor could not maintain an appeal to reverse or modify the judgment order or decree because he had secured all the relief that he had sought. The Circuit Court of Appeals, however, modified the District Court's judgment or decree by

beginning the payment of rentals on March 22, 1940, rather than on October 27, 1938.

Facts.

The facts upon which the Circuit Court of Appeals rendered its decision (R. 136-140), concisely stated, are as follows: January 10, 1938, the District Court entered an order adjudging the petitioner, the petitioner herein, a bankrupt (R. 2) under Section 75(s) of the Bankruptcy Act.

On October 27, 1938, the District Court, without an appraisal being made, granted a three-year stay order and further ordered that the debtor pay rentals from and after that date (R. 36). Appraisers were appointed on February 6, 1940, and the report of appraisers was filed on March 22, 1940 (R. 40-43). The debtor remained in possession of the land during the three-year period after the entry of the stay order on October 27, 1938, and paid the rent as provided by the order for the first two and a half years of the period (R. 107, 138). On December 16, 1941, The Abbott Company, the mortgagee creditor, filed an application in the proceedings alleging that the three-year stay period had expired on October 27, 1941 (R. 104-109). The debtor, on his own behalf, on February 17, 1942, filed a motion, stating that the three-year stay period began from the filing of the appraisal of the property (R. 114). At the hearing on the application on May 13, 1942, the District Court set aside the order of October 27, 1938, in beginning the three-year stay period on that date and in its order, entered on May 13, 1942, but filed on May 29, 1942, retroactively began the three-year stay period on March 22, 1940, and further found that rentals were due from October 27, 1938 (R. 118-122).

The Circuit Court of Appeals refused to decide the question whether the District Court erred in retroactively beginning the stay order by applying the rule that one who secures by a judgment order or decree all the relief he seeks or one who complains of error for which he himself is responsible, cannot maintain an appeal to reverse or modify or review the proceedings on which such judgment was founded. The Circuit Court of Appeals, however, modified the District Court's order and began the payment of rents on March 22, 1940, rather than on October 27, 1938.

The court below failed to consider, in rendering its decision, that on March 9, 1940, new counsel entered his appearance on behalf of the petitioner (R. 115), that the District Court ordered, on April 22, 1942, further showings and arguments of the date or dates the stay order commenced (R. 117), and that said counsel argued on May 13, 1942, that the stay period began on the date of the court's order (R. 148, 149). That the District Court was fully appraised of said counsel's position is shown by the fact that eight days before the District Court filed its written order on May 29, 1942, that said counsel filed a notice of appeal on May 21, 1942, which specifically states that the three-year stay order begins on the date of the court's order (R. 123).

B.

Question Presented.

The questions presented are, first, whether the District Court's judgment or decree filed May 29, 1942, is void by not finding in said judgment or decree that all the conditions set forth in Section 75(s)(1) of the Bankruptcy Act had been complied with and by beginning, in said

judgment or decree, entered on May 13, 1942, and filed May 29, 1942, the three-year stay period on March 22, 1940; second, whether the record taken as a whole reflects that the debtor petitioner appealed from a judgment or order in his own favor; third, whether the debtor petitioner cannot at any time collaterally attack the void judgment or decree of the District Court and thereby has not waived his right to appeal; and fourth, whether rentals begin on May 29, 1942, the date the District Court filed its order beginning the stay period, or on March 22, 1940, the date the court in its order filed May 29, 1942, began the three-year stay period.

C.

Jurisdiction.

Jurisdiction to review the judgment of the Circuit Court of Appeals in this case is conferred upon this Court by the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A. 347[a]).

The judgment of the Circuit Court of Appeals for the Eighth Circuit was rendered on June 21, 1943 (R. 136-144) and the petition for rehearing (R. 145-153) was denied on July 21, 1943 (R. 155).

D.

Reasons Relied on for Allowance of Writ.

1. In holding that the District Court judgment or order was valid and not void (by refusing to pass upon the question and affirming the District Court) in retroactively beginning the three-year stay order provided for in Section 75(s) (2) of the Bankruptcy Act on March 22, 1940,

the date the appraisal was filed rather than on May 13, 1942, the date the judgment or decree of the District Court was entered, the Circuit Court of Appeals has decided a federal question in a way directly in conflict with the controlling decision of this court in *Borchard* v. *California Bank*, 310 U. S. 311, 84 L. Ed. 1222, 60 S. Ct. 957, and directly in conflict with that of the United States Court of Appeals for the Tenth Circuit in the case of *Paradise Land & Livestock Co.* v. *Federal Land Bank*, 118 F. (2d) 215.

2. In holding that the District Court judgment or order was valid and not void (by refusing to pass upon the question and affirming the District Court), in automatically beginning the three-year stay period on March 22, 1940, the date the appraisal was filed without a judgment order on that date, and by retroactively beginning the stay order on May 29, 1942, without first finding that all of the conditions set forth in Section 75(s) (1) of the Bankruptcy Act have been complied with, the Circuit Court of Appeals has decided a federal question directly in conflict with that of the United States Court of Appeals for the Ninth Circuit in the cases of *Hardt* v. *Kirkpatrick*, 91 F. (2d) 875, 878, certiorari denied 303 U. S. 626, 58 St. Ct. 762, 82 L. Ed. 1088; and *Bernards* v. *Johnson*, 103 F. (2d) 567, 571, affirmed 313 U. S. 537, 85 L. Ed. 1507, and in direct conflict with that of the United States Court of Appeals for the Tenth Circuit in the case of *Paradise Land & Livestock Co.* v. *Federal Land Bank, supra.*

3. In failing to consider all the facts in the case which clearly reflect that the District Court's attention was directed, at the hearing held May 13, 1942, to the fact that the debtor's (petitioner's) position at that time was that the three-year stay period began on the date of the court's order and not at the date of filing the appraisal, the Cir-

cuit Court of Appeals erred in holding that the debtor petitioner appealed from a judgment in his own favor or was responsible that said judgment or order was rendered by the District Court.

4. In holding that the debtor petitioner cannot collaterally attack or maintain an appeal from the void judgment or order of the District Court, the Circuit Court of Appeals has decided a question directly in conflict with the controlling decisions of this court in *Windsor* v. *McVeigh*, 93 U. S. 274, 282, 23 L. Ed. 914, 917; *Hovey* v. *Elliott*, 167 U. S. 409, 446, 42 L. Ed. 215, 231, 17 S. Ct. 861; and Note 39 L. R. A. 449; *Ex. Parte Rowland*, 104 U. S. 604, 26 L. Ed. 861, *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; and in direct conflict with the decision of the Circuit Court of Appeals for the District of Columbia in the case of *Fishel* v. *Kite*, 101 F. (2d) 685, 687.

5. In holding that the debtor petitioner waived his rights under Section 75(s) (1) (2) (3) of the Bankruptcy Act by his motion dated February 17, 1942, and refusing to pass on whether or not a proper and orderly procedure was had in this matter under these sections, the Circuit Court of Appeals has decided a federal question in a way directly in conflict with the controlling decisions of this court in *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273, 85 L. Ed. 185; *John Hancock Mutual Life Ins. Co.* v. *Bartels*, 308 U. S. 180, 84 L. Ed. 186, 60 S. Ct. 221; and *Borchard* v. *California Bank, supra.*

6. In holding that rentals on the property involved began on March 22, 1940, instead of May 29, 1942, the date of the District Court's order, the Circuit Court of Appeals has decided a federal question in a way directly in conflict with the language used in the statute involved, Section 75(s)(2) of the Bankruptcy Act.

E.

Prayer for Writ.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cause entitled and numbered on its docket, *Charles J. Mach, Debtor, appellant,* v. *The Abbott Company, a Corporation, appellee,* No. 12422, In Bankruptcy; that the judgment of the Circuit Court of Appeals for the Eighth Circuit in said cause may be reviewed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinion Below.

The opinion of the United States Court of Appeals for the Eighth Circuit is not yet officially reported, but is set out on pages 136-144 of the Record. The opinion or order of the District Court of the United States for the District of Nebraska was not officially reported, but is set out on pages 118-122 of the Record.

II.

Jurisdiction.

A concise statement of the grounds on which the jurisdiction of this court is invoked appears under the headings C and D in the petition for certiorari, *ante,* and in the interest of brevity is not repeated here.

III.

Statement.

A concise statement of the case containing all that is material to the consideration of the questions presented, including a summary of the questions presented is set out under headings A and B of the petition for certiorari, *ante,* and in the interest of brevity is not repeated here.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In affirming the District Court's order, entered on May 13, 1942, and filed May 29, 1942, retroactively beginning the three-year stay order, provided under paragraph 2 of Section 75(s) of the Bankruptcy Act, on March 22, 1940, the date the appraisal was filed.

(2) In affirming the District Court's order, entered May 13, 1942, automatically beginning the three-year stay period on March 22, 1940, without a judgment order on that date and without first finding in said order all of the conditions set forth in Section 75(s) (1) of the Bankruptcy Act.

(3) In failing to consider all the facts in the case which clearly reflect that the District Court's attention was directed, at the hearing held May 13, 1942, to the fact that the petitioner contended that the three-year period began at the date of the court's order and not at the date the appraisal was filed.

(4) In holding that the debtor petitioner cannot collaterally attack or maintain an appeal from the judgment or order of the District Court.

(5) In holding that the debtor petitioner waived his right to appeal by his motion dated February 17, 1942, and refusing to pass on whether or not the proper and orderly procedure was followed by the District Court, as provided under Section 75(s) of the Bankruptcy Act.

(6) In holding that rentals began on the property involved on March 22, 1940, instead of May 13, 1942, the date District Court's order was entered.

V.

Points and Authorities.

1.

The District Court had no power to give retroactive effect to its order of May 29, 1942, and start the running of the three-year stay period on March 22, 1940.

Borchard v. *California Bank,* 310 U. S. 311, 84 L. Ed. 1222, 1225, 60 S. Ct. 957;
Section 75(s) of the Bankruptcy Act, (11 U. S. C. A., Sec. 203[s]);
Paradise Land & Livestock Co. v. *Federal Land Bank,* 10 Cir., 118 F. (2d) 215, 217;
Hardt v. *Kirkpatrick,* 9 Cir., 91 F. (2d) 875, 878, Cert. denied 303 U. S. 626, 58 S. Ct. 762, 82 L. Ed. 1088;
Bernards v. *Johnson,* 9 Cir., 103 F. (2d) 567, 571, affirmed 313 U. S. 537, 85 L. Ed. 1507.

2.

The District Court had no power to begin the three-year stay period without first finding that all the conditions set forth in the statute had been complied with.

Section 75(s)(2) of the Bankruptcy Act (11 U. S. C. A., Sec. 203[s][2]);
Hardt v. *Kirkpatrick,* 9 Cir., 91 F. (2d) 875;
Bernards v. *Johnson,* 9 Cir., 103 F. (2d) 567;
Paradise Land & Livestock Co. v. *Federal Land Bank,* 10 Cir., 118 F. (2d) 215.

3.

In considering all the facts in this case the petitioner can maintain an appeal to reverse, modify, or review the judgment or order of the District Court.

Wear v. *Imperial Window Glass Co.,* 8 Cir., 224 Fed. 60, 63.
In re Bicknell, 48 F. Supp. 895.

4.

The petitioner can collaterally attack at any time the void judgment or order of the District Court.

Section 75(s)(1)(2) of the Bankruptcy Act (11 U. S. C. A., Sec. 203[s][1][2]);
Electrical Corp. v. *Thomas & Betts Co.,* 307 U. S. 241, 242, 83 L. Ed. 1263, 50 S. Ct. 860;
Fishel v. *Kite,* (D. C.) 101 F. (2d) 685, 687;
Windsor v. *McVeigh,* 93 U. S. 274, 282, 23 L. Ed. 914, 917;
Hovey v. *Elliott,* 167 U. S. 409, 446, 42 L. Ed. 215, 231, 17 S. Ct. 841;
Ex parte Rowland, 104 U. S. 604, 26 L. Ed. 861;
Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872;
People ex rel. v. *Burke,* 72 Col. 486, 502, 212 Pac. 837, 843, 30 A. L. R. 1085, 1096;
Note 39 L. R. A. 449.

5.

It is the duty of the appellate courts to determine whether or not an orderly and proper procedure was followed by the District Court and the debtor petitioner cannot waive the proper procedure to be complied with under the law.

John Hancock Mut. Life Ins. Co. v. *Bartels,* 308 U. S. 180, 84 L. Ed. 186, 60 S. Ct. 221;

Wright v. *Union Central Life Ins. Co.,* 311 U. S. 273, 85 L. Ed. 184, 61 S. Ct. 196;
Borchard v. *California Bank,* 310 U. S. 311, 84 L. Ed. 1222, 1225, 60 S. Ct. 957;
Section 75(s) of the Bankruptcy Act (11 U. S. C. A., Sec. 203[s]).

6.

Payment of rentals begin on the date the court entered its order staying proceeding and not before.

Section 75(s)(2) of the Bankruptcy Act (11 U. S. C. A., Section 203[s][2]);
Binns v. *Lawrence,* 53 U. S. 9, 13 L. Ed. 871, 12 How. 9;
U. S. v. *Stewart,* 61 S. Ct. 102, 311 U. S. 60, 85 L. Ed. 40;
Helvering v. *Hammell,* 61 S. Ct. 368, 311 U. S. 504, 85 L. Ed. 303.

VI.

ARGUMENT.

1.

The District Court had no power to give retroactive effect to its order filed May 29, 1942, and start the running of the three-year stay period on March 22, 1940.

This court, in the case of *Borchard* v. *California Bank,* 310 U. S. 311, 84 L. Ed. 1222, 1225, 60 S. Ct. 957, held that the scheme of the provisions of Section 75(s) of the Bankruptcy Act "is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer debtor" and "that orderly procedure includes * * * the entry of a stay which will assure him of his possession for three years from the date of the order." The court's order in this case was entered on May 13, 1942, and filed May 29, 1942, and under the decision of this court, the District Court, affirmed by the Circuit Court of Appeals, had no power to begin the stay order on March 22, 1940.

The stay provided for in paragraph 2 of Section 75(s) is not an automatic stay, but a judicial one. *Paradise Land & Livestock Co.* v. *Federal Land Bank,* (10 Cir.) 118 F. (2d) 215, 217; *Hardt* v. *Kirkpatrick,* (9 Cir.) 91 F. (2d) 875, 878; and *Bernards* v. *Johnson,* (9 Cir.) 103 F. (2d) 567, 571, affirmed 313 U. S. 537, 85 L. Ed. 1507. In *Paradise Land & Livestock Co.* v. *Federal Land Bank, supra,* the District Court, in its order of August 7, 1940, retroactively began the three-year stay period as of September 8, 1938. The Tenth Circuit Court of Appeals in its opinion (l. c. 218) said:

> "We are of the opinion that the court was without power to give retroactive effect to its order of August 7, 1940, and start the running of the three-year stay period as of September 8, 1940."

Clearly, the District Court in the case at bar had no power to give retroactive effect to its order entered on May 13, 1942, and filed May 29, 1942; and start the running of the stay period on March 22, 1940. Having no power to make such an order under the statute, its judgment or order is, therefore, void.

2.

The District Court had no power to begin the three-year stay period without first finding that all the conditions set forth in the statute had been complied with.

Paragraph 2 of Section 75(s) of the Bankruptcy Act provides in part:

> "* * * when the conditions set forth in this section have been complied with the court shall stay all judicial or official proceeding in any court, * * * for a period of three years."

The conditions that have to be complied with are an appraisal, approval of the appraisal by the referee, and orders of the referee as provided in paragraph 1 of Section 75(s) of the Bankruptcy Act.

The Tenth Circuit Court of Appeals and Ninth Circuit Court of Appeals have held in the following cases in construing this section of the Bankruptcy Act that "the stay provided for is not an automatic stay but a judicial one, to be granted only upon a finding that the conditions set forth in the section have been complied with." *Hardt*

v. *Kirkpatrick, supra; Bernards* v. *Johnson, supra;* and *Paradise Land & Livestock Co.* v. *Federal Land Bank, supra.*

The District Court, in its order dated May 29, 1942 (R. 118-122), made a finding that an appraisal was made but makes no findings that the appraisal was approved by the referee or that the conditions set out in paragraph 1 of Section 75(s) have been complied with. The reason for doing so is that no orders were made by the referee after the appraisal was filed on March 22, 1940, as provided for in this paragraph and section. The District Court's order and judgment beginning the stay period prior to the date of its order (R. 118-122), without stating that all of the conditions set forth in the statute have been complied with, is, therefore void, because it had no power to make an order setting the three-year stay period without finding the conditions prescribed under the statute.

3.

In considering all the facts in this case the petitioner can maintain an appeal to reverse, modify, or review the judgment or order of the District Court.

The Circuit Court of Appeals refused to decide the question whether the District Court erred in its order entered on May 13, 1942, and filed May 29, 1942, by applying the rule that one who secures by a judgment order or decree all of the relief he seeks or one who complains of error for which he himself is responsible cannot maintain an appeal to reverse or modify or review the proceedings on which such judgment is founded.

The court based its decision on the fact that the debtor in objecting to the appellee's motion to end the three-year

stay period on October 27, 1941 (the District Court first began the three-year stay period without an appraisal being made on October 27, 1938 [R. 36]), asserted in his motion filed on his own behalf, on February 17, 1942 (R. 114), that the three-year stay period began on March 22, 1940, the date of filing of the appraisal.

The court below, in rendering its decision, failed to consider that on March 9, 1942, new counsel entered his appearance on behalf of the debtor (R. 115); that the District Court ordered on April 21, 1942, a further showing and argument on the date or dates the stay order commenced (R. 117); that said counsel of the debtor argued on May 13, 1942, the date of the hearing, that the stay period began on the date of the court's order (R. 148, 149); and that the District Court was fully apprised of said counsel's and debtor's position at the date of the hearing on May 13, 1942, because eight days before the District Court filed his written order on May 29, 1942, the debtor filed a notice of appeal on May 21, 1942, which specially shows that the debtor's position before the District Court was that the three-year stay order should begin on the date the court entered its order and not on the date the appraisal was filed (R. 123).

One of the cases cited by the Circuit Court of Appeals as authority that the petitioner can not maintain an appeal is *Wear* v. *Imperial Window Glass Co.*, 8 Cir., 224 Fed. 60, 63. This decision also holds that if the specific error is pointed out to the trial court the appellate court must review such ruling. As stated, the petitioner did point out specific error to the District Court eight days before the written order of the District Court was filed. Further, the District Court believed it had power to give retroactive effect to its order entered May 13, 1942, and filed May 29, 1942. See *In re Bicknell*, 48 F. Supp. 895,

rendered by Judge Delehant, the district judge who entered the order appealed from in the case at bar.

Taking these facts in consideration, it is clear that the debtor did not appeal from a judgment in his own favor and that the Court of Appeals erred in not deciding the case on its merits.

4.

The petitioner can collaterally attack at any time the void judgment or order of the District Court.

Assuming, but not conceding, that the petitioner appealed from a judgment in his own favor, the petitioner, nevertheless, had the right collaterally to attack this judgment in the Circuit Court of Appeals. The cases the Circuit Court of Appeals cites (R. 141, 142) to support its ruling that the petitioner could not maintain an appeal in that court are all based upon the fact that the District Court had jurisdiction or power to enter its judgment and therefore the refusal of the appellate court to entertain the appeal left a valid judgment in the District Court. One, *Electrical Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241, 242, 83 L. Ed. 1263, 50 S. Ct. 860, granted certiorari because of a conflict of decisions and then, after stating the general rule, reversed the Court of Appeals and this court held that it had jurisdiction to direct the reformation of the decree.

In the case at bar the District Court, as heretofore shown, under the Bankruptcy Act, Section 75(s)(1)(2), had no power retroactively to begin the three-year stay period on March 22, 1940, or enter its order without finding that the conditions set forth in said section had been complied with, and as a result its judgment or order is void and can be attacked collaterally at any time. *Fishel*

v. *Kite,* (Dist. of Col.) 101 F. (2d) 685, 687. This is true even though the court had jurisdiction of the parties in subject matter. *Windsor* v. *McVeigh,* 93 U. S. 274, 282, 23 L. Ed. 914, 917; *Hovey* v. *Elliott,* 167 U. S. 409, 446, 42 L. Ed. 215, 231, 17 S. Ct. 841; *Ex parte Rowland,* 104 U. S. 604, 26 L. Ed. 861; *Ex parte Lange,* 18 Wall. 163, 21 L. Ed. 872; and *People ex rel. Burke,* 72 Col. 486, 502, 212 Pac. 837, 843, 30 A. L. R. 1085, 1096. See, also, Note 39 L. R. A. 449. The above cases are all in direct conflict with the Courts of Appeals' decision, holding that the District Court's decision could not be attacked in that court.

5.

It is the duty of the appellate courts to determine whether or not an orderly and proper procedure was followed by the District Court and the debtor petitioner cannot waive the proper procedure to be complied with under the law.

The Circuit Court of Appeals has in effect held that the petitioner by filing the motion dated February 17, 1940 (R. 114), has waived his rights under Section 75(s) of the Bankruptcy Act. There is no provision in the Bankruptcy Act which provides that a debtor can waive his rights and such ruling is clearly against public policy.

The duty of the appellate courts under these provisions of the Bankruptcy Act is to determine whether or not an orderly and proper procedure was followed by the District Court. This court, in the cases of *John Hancock Mutual Life Ins. Co.* v. *Bartels,* 308 U. S. 180, 84 L. Ed. 186, 60 S. Ct. 221; *Wright* v. *Union Central Life Ins. Co.,* 311 U. S. 273, 85 L. Ed. 184, 61 S. Ct. 196; and *Borchard* v. *California Bank, supra,* has determined that on the facts in each case an orderly procedure was not followed under

the provisions of this statute. Clearly it is the duty, and this court, as well as the Court of Appeals, has jurisdiction to determine whether or not an orderly and proper procedure, as set out in Section 75(s) of the Bankruptcy Act, was followed in this case. Having such a duty, the petitioner debtor cannot waive the correct procedure to be followed by the courts under the law.

6.

Payment of rentals began on the date the court entered its order staying proceeding and not before.

The court below began rentals on March 20, 1940, and this ruling is in direct conflict with that part of Section 75(s)(2) of the Bankruptcy Act (11 U. S. C. A. § 203[s][2]), which states that "The first payment of such rental shall be made within one year *of the date of the order* staying proceedings."

The order staying proceedings was entered on May 13, 1942, and filed May 29, 1942. To support its ruling, the Circuit Court of Appeals stated that this portion of the statute should read (R. 142): Within one year of "the effective date of the order staying proceedings." As the words in the statute are stated in plain and unequivocal terms, the Circuit Court of Appeals has no power to attempt to modify the language in the statute. *Binns* v. *Lawrence,* 53 U. S. 9, 13 L. Ed. 871, 12 How. 9; *U. S.* v. *Stewart,* 61 S. Ct. 102, 311 U. S. 60, 85 L. Ed. 40; *Helvering* v. *Hammell,* 61 S. Ct. 368, 311 U. S. 504, 85 L. Ed. 303. The decision of the Court of Appeals, therefore, is in direct conflict with these decisions of this court.

Conclusion.

For the reasons set forth in the petition and supported by the argument and authorities cited in this brief, we respectfully submit that this case is one calling for the exercise by this court of its supervisory powers in order that the various conflicts and errors herein pointed out may be corrected, and to that end we strongly urge the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX.

Section 75(s) (1), (2), (3) of the Bankruptcy Act, as amended, 11 U. S. C. A., Section 203(s) (1), (2), (3):

"*Adjudication as bankrupt on failure of proposal stay of other proceedings against debtor; purchase of property by debtor; application of section to former cases.*

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this title: *Provided,* That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

"(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

"(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the

estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this title, and may require such payments to be made quarterly, semi-annually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

"(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided,* That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided,* That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his

discharge, as provided for by this title. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title."

(24)

FILED
SEP 20 1943
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

October Term, 1943.

Case No. 296.

CHARLES J. MACH, *Debtor, Petitioner,*

vs.

THE ABBOTT COMPANY, a corporation, *Respondent.*

RESPONDENT'S STATEMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THE ABBOTT COMPANY, a Corporation,
By E. H. BOYD,
W. R. METZ,
L. H. HENDERSON,
of Alliance, Nebraska,
and FRED A. WRIGHT,
of Scottsbluff, Nebraska,
Attorneys for Respondent.

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In the Supreme Court of the United States

October Term, 1943.

CASE NO. 296.

CHARLES J. MACH, *Debtor, Petitioner,*

vs.

THE ABBOTT COMPANY, a corporation, *Respondent.*

RESPONDENT'S STATEMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, The Abbott Company, a corporation, respectively prays that the petition for writ of certiorari, heretofore filed herein on August 26, 1943, by Charles J. Mach, debtor, petitioner, asking a review of the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, made and entered in the above entitled cause on June 21, 1943, be denied.

Summary and Statement of the Matter Involved.

With respect to that part of the petition for writ of certiorari designated "Summary Statement of the Matter Involved," at pages 2 to 4, both inclusive thereof, respondent desires to point out several errors. Beginning at line 5 on page 2, there is found the following statement:

> "The District Court in its order or judgment, without finding that all of the conditions set forth in Section 75 (s) (1) of the Bankruptcy Act (11 U. S. C. A., Sec. 203 [s] [1]) has been complied with, began the three-year stay period, provided under Section 75 (s) (2) of the Bankruptcy Act (11 U. S. C. A., Sec. 203 [s] [2]) on March 22, 1940, the date the appraisal was filed, rather than on May 29, 1942, the date the order or judgment was entered. In addition, the District Court held that rentals began on October 27, 1938, under a previous ruling of the court, and as a result the debtor was delinquent in rentals."

A similar erroneous statement is made in the last sentence on page 3. Respondent denies that these statements correctly reflect the order or judgment of the District Court. The record plainly shows that the District Court found that with the making and filing of the appraisal on March 22, 1940, all the conditions set forth in Section 75 (s) (1) of the Bankruptcy Act (11 U. S. C. A., Sec. 203 [s] [1]) had been complied with and that, therefore, as a matter of law, the three-year stay period *had begun* to run from and after March 22, 1940, and would terminate on March 22, 1943 (R. 118-122). The District Court further found, as shown by the record (R. 118-112), that under a previous order of the court, not appealed from and final, petitioner was then delinquent in the payment of rentals and, therefore, ordered the payment of such delinquent rentals.

Further, at page 2 of his petition, petitioner states, in effect, that on appeal the Eighth Circuit Court of Appeals affirmed the judgment or order of the District Court "in retroactively beginning the three-year stay on March 22, 1940," and modified the District Court's judgment or decree by beginning the payment of rentals on March 22, 1940. The record (R. 136-143) shows that the Eighth Circuit Court of Appeals simply held (as the District Court had) that in fact and in law the three-year stay period *had begun* to run from and after March 22, 1940, and that said court neither held nor suggested that the District Court had retroactively begun the three-year stay period.

On the question of rentals, it will be obvious to this Court from an examination of the record that the Circuit Court of Appeals merely determined that the rentals should be computed on the basis of the three-year stay period beginning on March 22, 1940, instead of October 27, 1938, and to that extent modified the order of the District Court (R. 142, 143).

On page 4 of the petition it is stated, in effect, that the Eighth Circuit Court of Appeals erroneously considered that petitioner had contended before the District Court that the three-year stay period began on March 22, 1940, when in fact petitioner had contended before the District Court that the stay period would not begin until the date of the District Court's order, May 29, 1942. That the Circuit Court of Appeals in no way failed to understand the position taken by petitioner before the District Court and fully understood that the petitioner had attempted to change ground following the hearing on May 13, 1942, is apparent from the record (R. 141). There the Circuit Court of Appeals specifically points out that the petitioner did not except to the portion of the District Court's order of May 29, 1942, holding that the stay period had begun to run on March 22, 1940, although the petitioner,

at the same time, had taken exceptions to other portions of said order. At the same place (R. 141) the Circuit Court of Appeals observed the change in position on the part of the petitioner, pointing out that petitioner was then before the Circuit Court of Appeals claiming that the three-year stay period could not begin to run until the filing of the District Court's order on May 29, 1942.

Jurisdiction.

Respondent concedes the jurisdiction of this Court to hear and dispose of the petition for writ of certiorari.

Questions Presented.

On page 4 of his petition petitioner under the above heading sets forth four questions. Petitioner has misapprehended the scope and function of a petition for writ of certiorari. Necessarily, such petition must be confined to the questions presented to and passed upon by the Circuit Court of Appeals. An examination of the transcript of the record and the briefs filed in the Circuit Court of Appeals will make it very apparent that actually only three questions were presented originally to the District Court and on appeal to the Circuit Court of Appeals. Likewise, it will plainly appear that these three questions were the only ones determined by the Circuit Court of Appeals. It follows, therefore, in this Court that petitioner, in endeavoring to submit questions which are different and additional to those considered and passed upon by the courts below, is improperly and unnecessarily confusing and complicating the disposition of this case. The three questions previously referred to as having been submitted to and passed upon by the two lower

courts were: the date of the commencement of the stay period, the computation of delinquent rentals and the disallowance by the conciliation commissioner of the petitioner's claim for expenses in connection with the upkeep of the property. Petitioner does not make a single reference in his petition or supporting brief and argument to the third question above enumerated, and has abandoned his previous contention on that point. It accordingly follows that the ruling of the Circuit Court of Appeals on the two questions set out just above are the only ones which need be considered by this Court in the disposition of the petition. These correspond very roughly with petitioner's first and fourth questions.

Reasons Relied on by Petitioner for Allowance of Writ.

At pages 5, 6 and 7 of the petition and under the heading "Reasons Relied on for Allowance of Writ," petitioner sets forth virtually the same statements and contentions as are subsequently found and discussed in detail under the portions of his brief designated "Points and Authorities" and "Argument." Inasmuch as these portions of petitioner's brief will be given detailed attention hereafter, respondent omits extended reference at this point to that portion of the petition designated "Reasons Relied on for Allowance of Writ."

Prayer.

Wherefore, respondent respectfully prays that this Court may make and enter an order denying the petition for writ of certiorari filed herein on August 26, 1943, by Charles J. Mach, debtor, petitioner; that it may recover its costs and for such other and further relief in

the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

THE ABBOTT COMPANY, a Corporation,
By E. H. BOYD,
W. R. METZ,
L. H. HENDERSON,
of Alliance, Nebraska,
and FRED A. WRIGHT,
of Scottsbluff, Nebraska,
Attorneys for Respondent.

RESPONDENT'S BRIEF AND ARGUMENT.

Points and Authorities.

I.

The District Court was acting within the authority expressly vested in it by the provisions of Section 75 (s), subsection 2, of the Bankruptcy Act and in accordance with the applicable decisions of this Court and the lower Federal Courts in finding and adjudging that the three-year stay period began on March 22, 1940.

Wright v. *Union Central Life Insurance Company,* 311 U. S. 273, 85 L. Ed. 184, 61 S. Ct. 196.
Section 75 (s) of the Bankruptcy Act, 11 U. S. C. A., Section 203 (s).
In re Gammill, 45 F. Supp. 238.

II.

The three-year stay period began with the making and filing of the first appraisal on March 22, 1940, and no further finding by the District Court as to the fulfillment of the conditions set forth in the Bankruptcy Act or further order by the District Court as to the stay period was necessary.

Section 75 (s) of the Bankruptcy Act, 11 U. S. C. A., Section 203 (s).
In re Whitwer, 44 F. Supp. 466.

III.

Petitioner cannot maintain an appeal to reverse or modify a portion of an order or judgment of the District Court which petitioner had, prior to the making of said order or judgment, urged that court to make and to which portion of said order or judgment petitioner had failed to take exception.

Electrical Fittings Corporation v. *Thomas and Betts Company,* 307 U. S. 241, 83 L. Ed. 1263, 59 S. Ct. 860.

Public Service Commission v. *Brashear Freight Lines, Inc.,* 306 U. S. 204, 83 L. Ed. 608, 59 S. Ct. 480.

Lindheimer v. *Illinois Bell Telephone Co.,* 292 U. S. 151, 78 L. Ed. 1182, 54 S. Ct. 658.

New York Telephone Co. v. *Maltbie,* 291 U. S. 645, 78 L. Ed. 1041, 54 S. Ct. 443.

Guarantee Co. of North America v. *Phenix Ins. Co.,* 124 F. 170, certiorari denied, 187 U. S. 640, 47 L. Ed. 345, 23 S. Ct. 841.

Cockhran v. *M. & M. Transport Co.,* 110 F. (2d) 519.

Law v. *United States,* 266 U. S. 494, 69 L. Ed. 401, 45 S. Ct. 175.

Wear v. *Imperial Glass Co.,* 224 F. 60.

Illinois Central R. R. Co. v. *Egan,* 203 F. 937.

National Waterworks Co. v. *Kansas City,* 62 F. 853.

2 Am. Jur. 945.

3 Am. Jur. 427.

IV.

The District Court had jurisdiction to make and enter the order from which petitioner attempted to appeal and, hence, the Circuit Court of Appeals was correct in holding that petitioner could not appeal to reverse or modify a portion of the order he had sought and obtained.

In re McGoldrick et al., 121 F. (2d) 746.
In re Ostlind Mfg. Co., 19 F. Supp. 836.

V.

Debtor petitioner has not, in fact, waived any of his rights under the Bankruptcy Act, and has not been deprived of an orderly and proper administration under the Bankruptcy Act, but, as a matter of law, debtor petitioner is free to accept any procedure other than that laid down in the Bankruptcy Act, and thus waive a course of procedure upon which he might otherwise insist.

In re Denney, 135 F. (2d) 184.

VI.

The Circuit Court of Appeals was acting in accordance with the provisions of Section 75 (s), subsection 2, of the Bankruptcy Act, and in accordance with the applicable decisions of this Court and the lower Federal Courts in finding and adjudging that the rentals should be computed on the basis of the three-year stay period commencing on March 22, 1940.

Section 75 (s) (2) of the Bankruptcy Act, 11 U. S. C. A., Section 203 (s) (2).
Hepker v. *Equitable Life Assur. Soc. of United States*, 131 F. (2d) 926.

ARGUMENT.

I.

The District Court was acting within the authority expressly vested in it by the provisions of Section 75 (s), subsection 2, of the Bankruptcy Act, and in accordance with the applicable decisions of this Court and lower Federal Courts in finding and adjudging that the three-year stay period began on March 22, 1940.

Petitioner's argument supporting the first point set out in his brief under "Points and Authorities," is based almost entirely upon the case of *Borchard* v. *California Bank,* 310 U. S. 311, 84 L. Ed. 1222, 60 S. Ct. 957. Petitioner contends that under the holding of this Court in that case, the District Court erred in not making an order starting the three-year stay period on May 29, 1942, and likewise that the Circuit Court of Appeals was in error in affirming the District Court on this point. Petitioner at page 14 of his argument without so stating actually quotes first a part of the opinion in *John Hancock Mutual Life Insurance Company* v. *Bartels,* 308 U. S. 180, 85 L. Ed. 184, 60 S. Ct. 221, as copied into the opinion in the later case and follows it with the quotation of a portion of Mr. Justice Roberts' opinion in *Borchard* v. *California Bank, supra.* While the impression created by the quotation, unexplained, is that it came only from the Borchard case, the fact is that this Court in the later case was in part quoting from the Bartels case. The two partial and disconnected quotations do not accurately represent the holdings of this Court in either of the cases referred to and only add confusion to the consideration of petitioner's first point.

In the Bartels case this Court held that the District Court had failed to have an appraisal made and reversed the District Court's order dismissing the debtor's petition, because an appraisal was required by the statute and had not been allowed. Respondent submits that the absence of an appraisal in the Bartels case is a distinguishing factor between such case and the case at bar. In the case at bar, as shown by the transcript of the record (R. 41, 42, 43, 114) an original appraisal was filed on March 22, 1940, and a re-appraisal, made at the petitioner's request, was filed on September 4, 1940. This Court, in the Bartels case, specifically states:

> "Bartels then asked, also as provided in subsection (s), that his property be appraised, that his exemption be set aside to him as provided by state law, and that he be allowed to retain possession of his property, under the supervision of the court, that is, subject to such orders as the court might make in accordance with the statute. The court failed to take that action. Instead of having the property appraised, the court received conflicting testimony as to value, discussed the chances of the debtor's rehabilitation, and dismissed the petition and all proceedings thereunder."

Respondent desires to make it clear at this point that it has never contended and does not now contend that the three-year stay period can begin to run in the absence of an appraisal, which was admittedly lacking in the Bartels case. The lack of an appraisal in the Bartels case entirely destroys the value of such case as an authority favoring the petitioner.

Turning to the Borchard case, respondent calls attention to an important fact which petitioner apparently overlooked in citing such case as authority supporting his

first point. As this Court is aware, the appraisal in the Borchard case was made while the debtor was in the stage of the conciliation proceedings covered by subsections (a) to (r) of Section 75 of the Bankruptcy Act and not after he was within the provisions of subsection (s) of that Act. Since there is no provision or authority for an appraisal prior to subsection (s), the legal situation was the same as though no appraisal had ever been made and filed at any stage of the proceedings. This is borne out by the following statement of this Court, at page 1223 of 84 L. Ed.:

> "March 25, 1935, the Conciliation Commissioner appointed appraisers, who filed an appraisement on May 1, valuing the debtor's real estate at $68,550. It is to be noted that § 75 contains no provisions for appraisal during the course of the Conciliation Proceedings covered by subsection (a) to (r); nor do we find any rule of the District Court providing for appraisal at this stage of the cause."

When this situation is understood, it will be immediately realized that as a matter of law no appraisal was ever made and filed as provided by the Bankruptcy Act at any stage of the proceeding, and no stay order was ever made and entered. It is therefore very easy to understand why the creditor was denied relief by this Court in the Borchard case. At the same time it becomes very apparent why the Borchard case and the case at bar are definitely distinguishable on the facts and why they are governed by different legal principles. In the Borchard case there was no appraisal, no stay order and no recognition of the jurisdiction of the Bankruptcy Court with the obvious result that the three-year stay period had never commenced and, as this Court correctly held, the debtor was entitled to have an appraisal made, his exemptions set off and a stay order entered. Contrasted with that situa-

tion, in the case at bar a valid appraisal has been made and filed, a valid reappraisal has been made and filed, and the absolute jurisdiction of the Bankruptcy Court has been recognized by the debtor and creditor alike at all times during the pendency of the entire proceeding. When it is realized that there was no appraisal of any kind in the Bartels case and that in the Borchard case this Court treated the situation as though no valid appraisal had been made and filed, and that in neither case had there been a stay order entered, it is apparent that the two fragmentary quotations made by petitioner at page 14 of his argument cannot and do not represent the holdings of this Court in the two cases referred to and, further, because of the different factual situation involved, petitioner's contention that the Borchard case is controlling in the case at bar is entirely unfounded.

Even if the holdings in the Borchard and Bartels cases were applicable to the facts involved in the instant case, respondent submits that the construction given these two cases by this Court in the later case of *Wright* v. *Union Central Life Insurance Company,* 311 U. S. 185, 85 L. Ed. 184, 61 S. Ct. 196, is correct and when applied to the present case leads necessarily to the conclusion that the District Court correctly held that the three-year stay period began to run on March 22, 1940. In the first paragraph of the opinion in the Wright case, the following language is found:

> "The present record does not disclose all that has transpired in this proceeding. For example, it does not appear whether the debtor asked for an appraisal under 75 (s), which it is the duty of the court to make on such request and in which event the three-year stay provided for in 75 (s) (2) may start to run only after such appraisal has been made. *John Hancock Mut. L. Ins. Co.* v. *Bartels,* 308 U. S. 180, 84 L.

> Ed. 176, 60 S. Ct. 221, 41 Am. Bankr. Rep. (N. S.) 296; *Borchard* v. *California Bank,* 310 U. S. 311, 84 L. Ed. 1222, 60 S. Ct. 957, 42 Am. Bankr. Rep. (N. S.) 596. But such problem is not sharply represented by the record before us. The narrow issue presented by this petition for certiorari and which moved us to grant it is whether under 75 (s) (3) the debtor must be accorded an opportunity, on his request, to redeem the property at the reappraised value or at a value fixed by the court before the court may order a public sale." (The underlining is ours.)

It will be noted that this Court in the Wright case specifically stated that the three-year stay period may start to run only after the appraisal has been made and filed. This was exactly the effect of the order of the District Court concerning which petitioner is complaining.

The remainder of the petitioner's argument, under his first point, is devoted to a discussion of the case of *Paradise Land & Livestock Co.* v. *Federal Land Bank of Berkeley,* 118 F. (2d) 215. Incidentally, petitioner also cites *Hardt* v. *Kirkpatrick,* 91 F. (2d) 875, and *Bernard* v. *Johnson,* 103 F. (2d) 567, affirmed 313 U. S. 537, 85 L. Ed. 1507. The two last named cases are cited by petitioner at subsequent points in his brief and inasmuch as they will be given detailed attention later, no effort will be made to analyze them in connection with this branch of the case. Petitioner cites the three cases just referred to as establishing that the three-year stay provided for in paragraph 2 of Section 75 (s) is not an automatic stay but a judicial one. Respondent takes no exception to the holding of these cases, but is unable to see how the principle announced has any application to the facts of the instant case, for in the instant case, whether or not it was necessary, we find an order specifically granting the three-year stay.

The record (R. 36) shows that Judge Munger entered a stay order on October 27, 1938. There is no dispute that this order was not appealed from and has long since become final. It it doubtful whether, under the holdings of this Court discussed above, such order could have force and effect until the subsequent making and filing of the appraisal on March 22, 1940. Certainly, it cannot be contended by petitioner that from and after March 22, 1940, a stay was not in effect, and neither can he contend that the original stay order and the subsequent appraisal constituted action other than judicial in character.

Turning to the case of *Paradise Land & Livestock Co.* v. *Federal Land Bank of Berkeley, supra,* respondent believes that this Court will recognize, first, that such case on its facts is entirely different from the case at bar, and second, that even if it were conceded for the purpose of argument that such case is similar on its facts to the instant case the holding of the Tenth Circuit Court of Appeals in the Paradise case is contrary to the holding of this Court in *Wright* v. *Union Central Life Insurance Company, Borchard* v. *California Bank,* and *John Hancock Mutual Life Insurance Company* v. *Bartels, supra.* With respect to the facts involved in the Paradise case, a careful reading of the opinion reveals that the appraisal in such case preceded, by over two years, the entry of a stay order of any kind, and that the order appealed from (the stay order) was in fact a *nunc pro tunc* order. As previously noted, in the present case the stay order preceded the appraisal and the order of the District Court which was appealed from and that the order appealed from was not a stay order nor *nunc pro tunc* in its operation.

Further, in the Paradise case the debtor had in no way recognized the jurisdiction of the Bankruptcy Court. While an appraisal had been filed, the debtor's exemptions had never been set off to him, he had paid no rent, and no

stay order had been entered giving him the protection of the Bankruptcy Court. In the instant case, on the other hand, a valid appraisal, stay order and a valid reappraisal had been made and filed, the debtor had paid rent under the original rental order of the court, and at all times the complete jurisdiction of the Bankruptcy Court had been recognized both by the debtor and his creditors. Petitioner submits, therefore, that in view of the different factual situations involved the holding in the Paradise case could have no application to the present case.

As has heretofore been stated, if it were conceded for the purpose of argument that the facts of the Paradise case and the present case are similar, the holding of the Tenth Circuit Court of Appeals in the Paradise case is contrary to the principles announced by this Court in *Wright* v. *Union Central Life Insurance Company, Borchard* v. *California Bank,* and *John Hancock Mutual Life Insurance Company* v. *Bartels, supra.* In all three of these cases, as this Court will recall, it was only held that in any event the three-year stay period could not begin to run until after an appraisal had been made and filed, and in none of these cases did this Court hold that a prior stay order was necessary to the beginning of such three-year period.

Respondent directs the Court's attention to the case of *In Re Gammill,* 45 F. Supp. 238, a District Court case in which the facts involved are practically identical with those in the case at bar and the opinion especially well reasoned. There the debtor was adjudicated a bankrupt under the provisions of subsection (s), Section 75, and on August 10, 1936, appraisal was made which was filed on August 18, 1936, and the exemptions of the bankrupt set aside to him two days later without any request being made by the bankrupt to have the appraisal made and the exemptions set aside to him. *No stay order was ever en-*

tered in the case. The opinion states, at page 239, that the appraiser filed their report and there is no reference in the opinion to any approval by the Conciliation Commissioner or the District Judge. On November 17, 1939, over three years after the filing of the appraisal, a secured creditor filed a petition suggesting the expiration of the three-year moratorium period and praying for the appointment of a trustee and the sale of the property as provided for under the statute, and also for the discharge of the debtor and the closing of the estate. A hearing was held before the Conciliation Commissioner. Among other things, he found that "more than three years had elapsed since the debtor was adjudged a bankrupt." Notice was given to all persons interested and, no exceptions or objections having been filed within the time provided, the District Court entered an order which, among other things, discharged the debtor from bankruptcy and authorized the secured creditors to pursue any remedies they might have under the laws of the state of Illinois. Over a year later the debtor filed a petition asking that the court restrain the secured creditors from prosecuting any proceedings against him in the state courts of Illinois. The debtor's contention was that since no stay order had actually been entered either before or following the appraisal of the bankrupt's property and the setting aside to him of his exemptions, the moratorium period had never started to run and that he was entitled to be restored to the possession of his property and to have a stay order entered declaring another three-year moratorium period, after which he should have an opportunity to redeem the land at its appraised or reappraised value. It should be noted that this is virtually the exact contention made by the petitioner in the Mach case. The court held that the three-year stay period had started to run from the filing of the appraisal and the setting aside

to the bankrupt of his exemptions, even though (as in the case at bar) no stay order had ever been entered prior or subsequent to the filing of the appraisal. It should be here noted that in the Mach case such an order was entered before the filing of the appraisal. At page 241 the court makes the following statement:

> "It seems to me that the appraisal of the defendant's property, the setting aside to him of his exemptions, and the arrangement whereby bankrupt was left in possession of and given the actual use of all of the property he was himself farming and using prior to bankruptcy, started the three-year moratorium period not later than August 20, 1936, the date of his exemptions were set off to him after the report of appraisers filed on August 18, 1936. This result is not affected by the failure to enter a stay order for the reason that the absolute jurisdiction of this court was recognized by bankrupt and creditors alike at all times during the pendency of the entire proceeding as if stay order had been entered."

Respondent submits that the language used by the court in such case would and should have equal or greater force and application to the facts involved in the instant case. It should be noted that in the Illinois case as in the case at bar the debtor assumed that the three-year stay was running and that he was entitled to the protection of the bankruptcy court to the same extent as though a stay order had in fact been entered pursuant to the appraisal and took full advantage of the protection so afforded, even as did Charles J. Mach in the case at bar.

Petitioner respectfully submits that in view of the foregoing authorities and what has been said herein, this Court cannot but sustain the order and decree as made by the District Court and as affirmed on appeal by the

Circuit Court of Appeals, to the effect that March 22, 1940, was the beginning of the three-year stay period.

2.

The three-year stay period began with the making and filing of the first appraisal on March 22, 1940, and no further finding as to the fulfillment of the conditions set forth in the Bankruptcy Act or further order by the District Court as to the stay period was necessary.

At the outset it should be noted that petitioner in the second part of his argument is assuming that the District Court in its order or decree made and entered on March 13, 1942, *began* the three-year stay period as of March 22, 1940. The authorities heretofore cited make it clear that the three-year stay period commences with the making and filing of the appraisal where there has been a prior stay order, as was true in the present case. Consequently, the District Court's order of May 29, 1942, was unnecessarily to start the running of the stay period. The order made could have no effect upon the running of three-year stay period and was merely declaratory of the legal situation which already existed. Such order, however, does serve the useful purpose of definitely fixing the terminal date of the three-year stay period as March 22, 1943.

Petitioner further contends that the three-year stay period could not begin to run on March 22, 1940, because the appraisal was never approved by the referee or judge, which action he contends is required by the Bankrupt Act. Three cases are cited by petitioner, at the top of page 16 of his brief, in support of this contention. Frankly, respondent is unable to find any language in these cases even tending to support the position that there must be an approval of the appraisal by the referee or judge. In

none of these was any question raised as to the presence or absence of approval of the appraisal. After a thorough search respondent has been able to find only one case on this specific point. In *In Re Whitwer,* 44 F. Supp. 466, a case originating in the Nebraska District, this exact question was raised. The debtor filed his amended petition under Section 75, subsection (s), on July 18, 1939, and was adjudicated a bankrupt under date of August 15, 1939. On September 22, 1939, the designated appraisers filed their appraisal. On October 13, 1939, debtor filed an application for exemptions.

No objections to the appraisal were ever filed and no formal order was ever made either by the Judge or by the Conciliation Commissioner, either approving and confirming it or setting it aside. Nor was any order made setting aside exemptions or allowing, in one single order, a stay of three years in accordance with the provisions of Section 75, subsection (s). On October 30, 1939, an order was made granting a stay of all proceedings until October 30, 1940, and prescribing certain rentals for the land. On May 9, 1941, a further order was made staying all judicial proceedings "for such additional period of one year from March 1, 1941, to February 28, 1942." On November 4, 1941, the debtor filed a petition asking for a further extension of the stay. A secured creditor subsequently filed objections to a further stay and requested a reappraisal.

The creditor contended that no further stay should be given the debtor because the three-year stay period had expired. The debtor contended that the three-year stay period had never started to run because the original appraisal had never been approved by the Conciliation Commissioner or Judge, and that therefore he was then entitled to a stay of three years. This, the Court will note, is the same contention as is being made in the case at bar.

The court there held that the appraisal was valid even though no order approving the appraisal had ever been made either by the Judge or Conciliation Commissioner, and specifically stated in the course of its opinion, at page 469, that such approval was not a jurisdictional prerequisite to the validity or finality of the appraisal. The court there lays down the following rule:

> "Section 75, sub. s, with due allowance for its palpable incoherence, does not seem necessarily to contemplate the approval by the referee (conciliation commissioner) of the appraisal in every case. The court is unable to say that such approval is a jurisdictional prerequisite to the validity or finality of the appraisal. There is no express mandate for approval in the amendatory 'section.' Nor is such a mandate to be found in 'the act' (meaning the Bankruptcy Act.) *In Re Bumpass,* D. C., 23 F. Supp. 876; *Federal Land Bank of Berkeley* v. *Nalder,* 10 Cir., 116 F. (2d) 1004. • • •
>
> To this court it seems probable that the language of Sec. 75, sub. s, with reference to approval of the appraisal by the referee, is merely a recognition of the fact that in an instance where an appraisal is made the object of attack there will actually be an order upon it by the referee, and a prescription of a period thereafter in which his action may be reviewed. Whatever may be its construction, it is patently confusing and incomplete. But it is hardly the mission of the court either to clarify its hopeless confusion or to supply its palpable omissions. The court holds only that the language in question is not sufficient to constitute a mandate for a referees' approval of every appraisal; and that the appraisal made in this case of September 22, 1939, is a valid and complete appraisal."

In the light of the facts involved in the case at bar and the state of the law on the point, it follows, respond-

ent contends, that the appraisal filed March 22, 1940, was valid and effective to begin the three-year stay period.

3.

Petitioner cannot maintain an appeal to reverse or modify a portion of an order or judgment of the District Court which petitioner had, prior to the making of said order or judgment, urged that Court to make and to which portion of said order or judgment petitioner had failed to take exception.

Petitioner does not deny the correctness of the ruling of the Circuit Court of Appeals to the effect that one who secures, by a judgment, order or decree, all the relief he seeks cannot maintain an appeal to reverse or modify such judgment, order or decree. He now claims, however, that in fact he had contended before the District Court that the stay period would not begin until the date of the District Court's order, and that, therefore, the rule just stated has no application. An examination of the record will clearly reveal that petitioner at all times before the District Court claimed that the three-year stay period should be deemed to have commenced on March 22, 1940, the date of the filing of the first appraisal. Respondent filed an application under date of September 16, 1941, asking, among other things, that the proceeding be terminated because of the termination of the three-year stay period on October 27, 1941 (R. 104-109). In opposition to this application, petitioner, under date of February 17, 1942 (R. 114), filed a motion which reads in part as follows:

> "that an appraisal was made and filed in this court on March 22, 1940, and a reappraisal of the debtor's property was later made and filed September 4, 1940, and that under subsection (s), Section 75, of the Act,

a stay of all proceedings against the debtor or his property must be granted for a period of three years from the filing of the appraisal of the property, for said time has not fully elapsed and determined.

Charles J. Mach,
(The underlining is ours.) Debtor."

At the hearing held at Grand Island, Nebraska, on May 13, 1942, the District Court, among other things, found and held that the three-year stay period began on March 22, 1940 (R. 118-122). The District Court verbally announced its decision at the conclusion of the hearing and afforded both parties an opportunity to take exceptions. *No exception was taken to this part of the order by the petitioner.* It was respondent who took exceptions to this part of the order. At the same time, petitioner took exceptions to other parts of the order which were adverse to his contentions. Is it believable that if in fact petitioner had then been making the contention which he made befor the Circuit Court of Appeals and makes before this Court he would have failed to take exception to that part of the order which he now claims was improper and erroneous?

Petitioner, at page 17 of his brief, places great importance on his notice of appeal filed May 21, 1942, eight days after the hearing and the oral decision of the District Court, and eight days before the District Court's written order was filed, as sustaining his present contention. When it is realized, however, that the notice of appeal was not in any way directed to the District Court and did not have and could not have had as its purpose the influencing of the District Court's decision, for that decision had already been made, but rather was given as a necessary step in appealing to the Circuit Court of Appeals, it becomes apparent that petitioner was attempting

a change to what he then considered a more favorable ground for the purpose of his proposed appeal. Likewise, it is clear that the facts of the instant case in this connection do not bring it within the rule of *Wear* v. *Imperial Window Glass Co.*, 224 F. 60, cited at the bottom of page 17 of petitioner's brief, for such case holds the calling of the alleged error to the attention of the trial court prior to the institution of steps leading to an appeal to be an indispensable preliminary thereto. As previously noted, the District Court in the Mach case had already advised the parties of his decision and it was in giving notice of his appeal that petitioner first made the contention which he makes in this portion of his brief. His claim that such action called the alleged error to the attention of the Trial Court is obviously fallacious. Clearly, the Circuit Court of Appeals was amply justified in light of the state of the record and the authorities cited in its opinion and set out immediately below herein in holding that petitioner could not appeal from a portion of an order he had sought to have made and entered and to which he had subsequently failed to take exception. *Electrical Fittings Corp.* v. *Thomas and Betts Co.*, 307 U. S. 241, 59 S. Ct. 860, 83 L. Ed. 1263; *Public Service Commission* v. *Brashear Freight Lines, Inc.*, 306 U. S. 204, 59 S. Ct. 480, 83 L. Ed. 608; *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 54 S. Ct. 658, 78 L. Ed. 1182; *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645, 54 S. Ct. 443, 78 L. Ed. 1041; *Guarantee Co. of North America* v. *Phenix Ins. Co.*, 124 F. 170, certiorari denied 187 U. S. 640, 23 S. Ct. 841, 47 L. Ed. 345; *Cockhran* v. *M. & M. Transp. Co.*, 110 F. (2d) 519, 2 Am. Jur. 945; *Law* v. *United States*, 266 U. S. 494, 45 S. Ct. 175, 69 L. Ed. 401; *Wear* v. *Imperial Window Glass Co.*, 224 F. 60; *Illinois Cent. R. R. Co.* v. *Egan*, 203 F. 937; *National Waterworks Co.* v. *Kansas City*, 62 F. 853, 3 Am. Jur. 427.

4.

The District Court had jurisdiction to make and enter the order from which petitioner attempted to appeal and, hence, the Circuit Court of Appeals was correct in holding that petitioner could not appeal to reverse or modify a portion of the order he had sought and obtained.

In the fourth part of petitioner's argument, the proposition is advanced that, even if it be conceded that the petitioner appealed from the judgment or order in his own favor, petitioner, nevertheless, had the right to attack collaterally this judgment or order, because it was void. Petitioner states that the case of *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241, 83 L. Ed. 1263, 59 S. Ct. 860, cited by the Circuit Court of Appeals, in connection with this point, actually does not support the rule announced by the Circuit Court of Appeals, and, in fact, supports the proposition advanced by petitioner in part four of his argument. However, a careful reading of this case will reveal that petitioner's statement is not warranted. The case actually held that the defendant in a patent infringement suit wherein plaintiff failed to prove infringement, but in which the court unnecessarily held the patent valid in part, may, though he is the successful party, appeal from so much of the decree as adjudged the validity of the patent, not for the purpose of obtaining a review of the merits, but to obtain the reformation of the decree. It is apparent, therefore, that this case is not authority for petitioner's proposition, and, in fact, supports the general rule followed by the Circuit Court of Appeals in the case at bar. Petitioner next cites a number of cases on page 19 of his brief and concludes his argument on this point by stating that such cases are in direct conflict with the Circuit Court of Appeals' decision, and at the same time support the proposition maintained by petitioner. We feel confident that this Court,

after a review of these cases, will agree with respondent that in each and every one of these cases the proceedings were void from the very start and the court at no time had jurisdiction to make the order in question. It will also appear that none of these cases involve proceedings under Section 75 (s) of the Bankruptcy Act. Respondent cannot conceive that petitioner seriously urges that the District Court, in the case at bar, would not have jurisdiction to enter the order and judgment complained of herein. The record shows that on January 10, 1938, the District Court had entered an order adjudging the debtor a bankrupt under Section 75 (s) of the Bankruptcy Act (R. 2, 3). From this point on until the making of the order appealed from, on May 13, 1942, the record reveals countless other instances demonstrating that not only was the petitioner within the jurisdiction of the District Court as a matter of law, but, in addition, both petitioner and his creditors had recognized the absolute jurisdiction of the District Court at all times. In the case of *In Re McGoldrick,* 121 F. (2d) 746, a similar question was raised, by the contention of debtor that the District Court had no jurisdiction to make and enter an order of sale, because of an alleged failure to comply with the conditions required under the Bankruptcy Act, precedent to the issuance of such an order. The Ninth Circuit Court of Appeals met this contention by referring to the case of *In Re Ostlind Mfg. Co.,* 19 F. Supp. 836, and quoting, approvingly, from such case in part as follows:

> "The fundamental purpose of the Act relating to bankruptcies is to conserve the properties for the benefit of debtor and creditors alike, or to reduce the assets to cash for distribution among the creditors. All the specific directions of these laws, although mandatory in form and subservient to these major purposes * * *.

"But it may be objected to that since the provision of statute and mandatory violation thereof removes the foundation for the orders. But jurisdiction, once established, is not so avoided * * *.

"Where a court has jurisdiction, it is not obliged to render correct decisions. It has authority to hear and determine. If within the scope of power and founded in jurisdiction, the decision, whether right or wrong, is a judicial act and a finality."

On the basis of the holding in the McGoldrick case, petitioner's position in the fourth point of his argument is entirely untenable and it necessarily follows that the Circuit Court of Appeals was correct in denying petitioner's attempted attack on the portion of the order or judgment of the District Court holding that the three-year stay period began to run on March 22, 1940.

5.

Debtor petitioner has not, in fact, waived any of his rights under the Bankruptcy Act, and has not been deprived of an orderly and proper administration under the Bankruptcy Act; but, as a matter of law, debtor petitioner is free to accept any procedure other than that laid down in the Bankruptcy Act, and thus waive a course of procedure upon which he might otherwise insist.

Part five of petitioner's brief appears at pages 5 and 6 thereof and has to do with his contention that the Circuit Court of Appeals has, in effect, held that by filing the motion dated February 17, 1940 (R. 114), petitioner waived his rights under Section 75 (s) of the Bankruptcy Act; that there is no provision in the Bankruptcy Act providing for such waiver, and that such waiver is clearly against public policy. Petitioner cites no case in support of his contention that it is against public policy for the

debtor petitioner to waive any right which he might have under the Bankruptcy Act, and contents himself with that naked, unsupported statement. In view of the obvious weakness of the petitioner's contention with respect to public policy, respondent will do no more than to observe that there is no more reason for public policy to oppose the debtor waiving his rights under the Bankruptcy Act than there is reason for public policy to oppose to the creditor waiving his rights under such Act.

While petitioner endeavors in this branch of the argument to create the impression that he was wrongfully held by the Circuit Court of Appeals to have waived his rights under the Bankruptcy Act and has been deprived of the benefits of an orderly and proper administration under the Bankruptcy Act, he does not, at any place, call attention to the instances where said alleged deprivations have taken place, or to those acts on his part which he claims were wrongfully construed as waivers. As a matter of fact, debtor petitioner has, by a combination of circumstances, actually obtained much more than his full share of the protection contemplated by the Bankruptcy Act. Since January 10, 1938, petitioner has been within the protection of the Bankruptcy Court. As appears from the transcript of the record, petitioner has many times failed and refused to obey the orders of the Conciliation Commissioner and the District Court, relative to the payment of rentals. While petitioner requested an appraisal on December 20, 1937, he waited over two years before he called the attention of the District Court to the fact that no appraisal had been made, and then obtained the appraisal which he should have obtained over two years previously. In February of 1942, petitioner was before the District Court claiming that the three-year stay period began to run on March 22, 1940, the date of the filing of the first appraisal. In the Circuit Court of Appeals he

claimed that the stay period *did not* begin to run at such time and never had started to run, and now he is before this Court making a similar contention. Surely, this Court cannot but conclude, as the District Court and the Circuit Court of Appeals did, that the debtor petitioner, Charles J. Mach, is attempting to make a mockery of the courts and defeat the ends of justice. Certainly, it must be concluded that it ill becomes the debtor, after having received the protection of the court for a period of over five years, now to repudiate the status he has occupied and flaunt the authority of the court in contending that no valid stay has ever been in effect.

The petitioner next contends that the Circuit Court of Appeals, in effect, held that the petitioner, by filing the motion of February 14, 1940, waived his rights under the Bankruptcy Act and there resulted therefrom a sanctioning of improper procedure under the Bankruptcy Act. Petitioner further contends that such holding is contrary to the doctrine of this Court, announced in the cases of *John Hancock Mutual Life Insurance Company* v. *Bartels*, *Wright* v. *Union Central Life Insurance Company*, and *Borchard* v. *California Bank*, *supra*. Respondent submits that the three cases relied upon by petitioner have no application to the facts of the case at bar, in so far as petitioner's contention in this portion of his argument is concerned. In all three of the cases cited by petitioner, there was an effort to compel the debtor to accept a course of procedure other than that provided by the Bankruptcy Act. In none of these cases did the debtors, in pleadings filed under the advice of counsel, request the court to take the action of which they later complained. It will be recalled that the petitioner did in the instant case on February 17, 1940, specifically request the action of which he now complains.

Unlike the conduct of the debtors in the three cases cited by petitioner, it is clear from the record in the case at bar that the petitioner voluntarily and knowingly requested the court to follow the procedure concerning which he now is complaining, and to that extent his conduct necessarily amounted to a waiver of his right now to insist upon the letter of the Bankruptcy Act. In *In Re Denney,* 135 F. (2d) 184, the farmer-debtor, in open court, personally and by counsel agreed to an order providing that he should have the right to redeem the land, at its agreed value, on or before a certain date, in default of which the land was to be sold. Subsequently, the debtor failed to redeem the property, in accordance with the agreement, and the District Court ordered a trustee appointed and the property sold. The debtor then contended, as petitioner does in this case, that the agreement should not be given force and effect because it was contrary to the procedure laid down by the Bankruptcy Act. He also contended that under a proper construction of the Bankruptcy Act such a waiver was not permitted. The debtor in the Denney case cited the Bartels case and the Borchard case. The Circuit Court of Appeals held that the farmer-debtor was free to accept any procedure other than that laid down in the Bankruptcy Act and thus waive a course of procedure which he might otherwise insist upon. In dealing with the contention of the farmer-debtor, which was virtually identical with that made by the petitioner in his case, the court said:

> "With this contention we are unable to agree. The statute has prescribed a certain procedure that must be followed if the farmer-debtor insists upon it. It is not for the courts to point out or explore any short cuts. The court cannot force the farmer-debtor to accept any procedure except that laid down in the statute. That is not to say that the farmer-debtor may

not come into open court with his attorney and understandingly and voluntarily agree to another procedure. He may deem it to his advantage to accept another procedure. This he is free to do, unless the farmer-debtor is to be considered a ward of the court, which view we do not accept. This being so, the appellant may waive a procedure which he may otherwise insist upon."

On the facts and in view of the decision in the Denney case, where the facts and the contentions of the various parties were all but identical with those in the case at bar, it is submitted that petitioner's conention in the fifth division of his argument is entirely without merit.

6.

The Circuit Court of Appeals was acting in accordance with the provisions of Section 75 (s), subsection 2, of the Bankruptcy Act, and in accordance with the applicable decisions of this Court and the lower Federal Courts in finding and adjudging that the rentals should be computed on the basis of the three-year stay period commencing on March 22, 1940.

Petitioner's position in the sixth division of his argument is that the Circuit Court of Appeals erred in holding that the obligation to pay rent began on March 22, 1940, and that, under a proper construction of the Bankruptcy Act, rentals would not become due and payable until May 29, 1942, the date of the filing of the District Court's order. In support of such contention, petitioner cites no cases and is satisfied to quote from the Bankruptcy Act at the point in Section 75 (s) (2), where provision is made as to the payment of rentals. He makes particular reference to the part of said section which reads:

> "The first payment of such rental shall be made within one year of the date of the order staying proceedings. * * *"

Petitioner then proceeds to reason that since there was no stay order made and entered by the District Court on March 22, 1940, the Circuit Court of Appeals was in error in holding that the obligation to pay rent began at such date. In relying on such an argument, petitioner obviously is assuming that the three-year stay period did not, as a matter of law, begin on March 22, 1940. As previously noted herein, under the decisions of this Court and the lower Federal Courts as applied to the facts in the case at bar, the stay began on March 22, 1940, and expired March 22, 1943. In the face of such legal situation, petitioner is, in effect, contending that in spite of the existence of the three-year stay period, there is no obligation on his part to pay rentals for such period simply because a second stay order was not made and entered on March 22, 1940. In making this contention, he completely overlooks the following provision of Section 75 (s) (2):

> "During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession." (The underlining is ours.)

The sustaining of petitioner's contention on this point would mean that while on the one hand he was entitled to all the benefits of a three-year stay from and after March 22, 1940, on the other hand he was under no obligation to comply with the express mandate of the Bankruptcy Act requiring the payment of rentals during the stay period.

In view of the obvious inconsistency of such position and its direct conflict with the provisions and spirit of the Bankruptcy Act, respondent submits that the Circuit Court of Appeals was clearly correct in its holding on this point.

In *Hepker* v. *Equitable Life Assur. Soc. of United States,* 131 F. (2d) 926, the District Court in entering its stay order also provided that rental should be paid from the date of adjudication in bankruptcy, which was some months previous. On appeal, the Eighth Circuit Court of Appeals held that the District Court erroneously required the debtor to pay rents prior to the beginning of the three-year stay period, but specifically held that the obligation to pay rents arose with the commencement of the three-year stay period. In the Circuit Court of Appeals, petitioner cited the Hepker case as sustaining his position on this point. The Circuit Court of Appeals made it clear in its opinion that while its holding in the Hepker case condemned the collection of rentals prior to the effective date of the stay, the responsibility to pay rent under the holding in such case began with the commencement of the stay period and, hence, in the case at bar, rentals were properly chargeable from and after March 22, 1940. In view of this application by the Circuit Court of Appeals of the rule announced in the Hepker case to the facts involved in the instant case, it becomes apparent why petitioner did not cite the Hepker case in its brief filed in this Court, after having done so before the court below. Respondent respectfully submits that in view of the preceding authorities and what has been said herein, the Circuit Court of Appeals was clearly correct in holding that the rentals should be computed on the basis of the three-year stay period, commencing March 22, 1940.

A review by this Court of the record will bring it vividly to the Court's attention that this debtor, Charles J. Mach, at all times treated the situation as though a stay was in effect. He was eager to seize, and did seize, any and all advantages that accrued to him by reason of proceedings being stayed, and thereby delayed and defeated all attempts on the part of the creditors to pursue their normal remedies. Seeing a possible advantage to him, he now takes exactly the opposite position. It would be most inequitable and shocking to the conscience were he now permitted to repudiate his previous conduct and receive advantages based on his claim that no stay was in effect. We cannot feel that this Honorable Court will lend the debtor its aid.

Conclusion.

The respondent, in view of what has been said herein, submits that the Circuit Court of Appeals in disposing of the issues before it could not rightfully have made different rulings than those in fact it did make, and that any different rulings on the part of the Circuit Court of Appeals would have constituted error requiring correction by this Court. Respondent, therefore, asks at the hands of this Honorable Court that the petition for writ of certiorari be denied.

Respectfully submitted.

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No. 296.

In the Supreme Court of the United States

October Term, 1943.

CHARLES J. MACH, *Petitioner,*

vs.

THE ABBOTT COMPANY, a Corporation, *Respondent.*

PETITIONER'S REPLY TO RESPONDENT'S STATEMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court of the United States

October Term, 1943.

CHARLES J. MACH, *Petitioner,*

vs.

THE ABBOTT COMPANY, a Corporation, *Respondent.*

No. 296.

PETITIONER'S REPLY TO RESPONDENT'S STATEMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Rule 38 of this court requires that briefs filed in support of the petition for writ of certiorari be direct and concise and this rule was followed by petitioner. Because of the great length of the respondent's brief in this matter and the misstatements contained therein, petitioner finds it necessary to point out to the court these errors. The decision of the court of appeals has since the printing of the petition been reported and can be found at 136 F. (2d) 7.

I.

The District Court was not acting within the authority of Sec. 75 (s) (2) of the Bankruptcy Act in determining that it had authority to begin the three-year stay period on March 22, 1940, in its order filed May 29, 1940.

Respondent has recognized that this case is to be decided on the main question presented to this court. Did the District Court have power to retroactively begin the three-year stay period on March 22, 1940, the day the appraisal was filed, in its order filed September 29, 1943?

Respondent stated that the District Court on October 27, 1938 (R. 36), began the three-year stay period on that date. That no appraisal had been made at that time is conceded by the respondent. It is then contended that this order became valid and effective automatically without any further action of the court on March 22, 1940, the date the appraisal was filed. This court has held that under Sec. 75 (s) (2) of the Bankruptcy Act that the law does not contemplate that any stay whatever may be granted until after the making of an appraisal. *John Hancock Mutual Life Insurance* v. *Bartels,* 308 U. S. 180, 60 S. Ct. 221, 84 L. Ed. 176; *Borchard* v. *California Bank,* 310 U. S. 311, 60 S. Ct. 957, 84 L. Ed. 1222; *Wright* v. *Union Central Life Insurance Co.,* 311 U. S. 273, 61 S. Ct. 196, 85 L. Ed. 184.

Respondent cites these cases of this court as authority that the District Court had power to begin the three-year stay period on March 22, 1940, in its order filed September 29, 1942. In coming to this conclusion, the respondent distorts the facts and ruling of this court in *Borchard* v. *California Bank, supra.* Respondent contends that the only appraisal that was made in that case was on March 25, 1935, under Sec. 75 (a) to (r) of the Bankruptcy Act (Res. Br. 15) and that no other appraisal was made.

The decision of that case shows (p. 1223 of 84 L. Ed. and 314 of 310 U. S.) that on September 10, 1935, the case was reinstated under Sec. 75 (s) of the Bankruptcy Act, and on October 18, 1935, the petitioner, Borchard, presented his petition under Sec. 75 (s) praying that an appraiser be appointed. An appraisal was made in 1938 and in connection with this appraisal this court said (p. 1224 of 84 L. Ed. and 315 of 310 U. S.):

> "May 24, 1938, the debtors petitioned the Conciliation Commissioner for an appraisal and the setting aside of the property to them, June 22, 1938, appraisers were appointed and they reported the value of the real estate as $87,300. It does not appear what, if any, proceedings were had before the Conciliation Commissioner upon the coming in of the appraisers' report."

Clearly, an appraisal was filed under the facts in the above case after March 25, 1935. It is noted that the court in stating the above facts states that no proceedings were had before the Conciliation Commissioner. This refers without question to the orders that are required to be made by Commissioner under Sec. 75 (s) (1) of the Bankruptcy Act after the appraisal has been filed. No such orders were made by the Commissioner in the case at bar after the appraisal was made on March 22, 1940.

This court did not hold in the *Borchard* case that the three-year stay period began on June 22, 1938, the date the appraisers filed their report, but instead approved the language in *John Hancock Mutual Life Insurance* v. *Bartels,* that Sec. 75 (s) and its subsections provided an orderly procedure to be followed, and then said (p. 1225 of 84 L. Ed.):

> "That orderly procedure includes an application by the debtor, such as was made in the present case,

> for an appraisal of the property, an order that the debtor remain in possession upon terms fair and equitable to him and to secure creditors, and the entry of a stay which will assure him of his possession for three years from the date of the order, upon the conditions mentioned in the Act."

Clearly, under the language used above this court held that the three-year stay period began from the date of the order of the court if the conditions met in the Act had been met. In the case at bar the first order of the court, after an appraisal had been made, was filed May 29, 1942, and this order was made without any orders of the Conciliation Commissioner's that are required under Sec. 75 (s) (1) of the Act.

In a case reported since the filing of our petition, *Corey* v. *Blake,* 136 F. (2d) 162, the Ninth Circuit Court of Appeals has passed upon this precise question. The court, l. c. 165, said:

> "Paragraph (1) of subsection s provides: 'After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances.' Thus, when appellants' property shall have been appraised as provided for in subsection s, it will be the duty of the commissioner (a) to issue an order setting aside to appellants their unencumbered exemptions, and their unencumbered interest or equity in their exemptions, as prescribed by State law, and (b) to

order that the possession, under the supervision and control of the court, of some part or parcel or all of the remainder of appellants' property shall remain in appellants, as provided for in subsection s, subject to all existing mortgages, liens, pledges or encumbrances. The commissioner has not made or issued either of these orders, and cannot do so until appellants' property shall have been appraised.

"Paragraph (2) of subsection s provides:

'When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession.' Thus, when the orders required by paragraph (1) shall have been made, it will be the duty of the commissioner to make the order required by paragraph (2), namely, an order staying all judicial or official proceedings in any court, or under the direction of any official, against appellants or any of their property, for a period of three years. The commissioner has not made that order and cannot do so until the orders required by paragraph (1) shall have been made."

Without any orders made by Sec. 75 (s) (1) an order was made in the above case granting a three-year stay period after an improper appraisal. In this connection the court said (l. c. 166):

"The order was unauthorized and improper. It did not conform to the requirements of paragraph (2) and, if it had done so, would have been premature, for the orders required by paragraph (1) had not been made, and have not yet been made."

In the case at bar the District Court ordered that three appraisers be appointed (R. 2, 3), and only two were appointed to appraise the property involved herein by the Conciliation Commissioner (R. 40), and no orders were made after the appraisal was filed by the Commissioner as required by Sec. 75 (s) (1) of the Bankruptcy Act. Clearly, on these facts the facts in this case come within the rule laid down by the Ninth Circuit in *Corey* v. *Blake, supra,* and this court in *Borchard* v. *California Bank, supra.*

Judge Delehant, who rendered the decision in the case at bar, also rendered the decision in the case of *In Re Whitwer,* 44 F. Sup. 466. It is interesting to note that the stay period in this case began on the day of the court's order, and that Judge Delehant after setting out in full Sec. 75 (s) (1) of the Bankruptcy Act, ruled, l. c. 469, that the three-year stay period could only begin after the preliminary steps [Sec. 75 (s) (1)] have been completed. He further stated that "a formal approval of the appraisal may ultimately be intruded into the Act through judicial construction" and without deciding "that an element of approval may necessarily be involved in the orders of the judge granting stays." We cannot see how this case helps the respondents.

In the case of *In re Gamill,* 45 F. Sup. 238, cited by respondent, the facts reflect that the case was closed, on order of abandonment, and leave for the secured creditors to pursue their remedies in the state court was made on June 5, 1940. No appeal was taken and this order became final. The bankrupt's petition was filed a year later to prevent the state courts from proceeding with the disclosure. The court property held, l. c. 242, that the order of abandonment "has long since become final and the bankrupt's petition must be and is denied."

We submit that the orderly procedure required by the

statute was not followed in the case at bar, and that the District Court had no power to begin the three-year stay period on March 22, 1940, in its order filed May 29, 1942.

II.

Facts of the case in the District Court.

Counsel for the petitioner before this court and in the Circuit Court of Appeals were not his attorneys before the District Court. We, therefore, cannot say absolutely what occurred at the hearing on September 13, 1942, but have had to rely on the record and files forwarded to us by our predecessors in this case.

Before the Court of Appeals neither party briefed, argued or cited any cases that the petitioner herein appealed from an order in his own behalf and the opinion rendered by that court on this point and cases cited were raised by that court.

The record discloses that the motion (R. 114) was filed by the petitioner on his own behalf and not by his attorneys. Petitioner has so advised us of this fact and that this is true is shown by the fact that all other motions in the record were filed for him and signed by his attorneys. The motion (R. 114) was filed on February 17, 1942, and the record shows that a new attorney, George B. Clark, entered his appearance on March 9, 1942 (R. 115). Among the papers forwarded to us was the memorandum brief of Mr. Clark, and this appears in the record at pages 148, 149 and 150. This brief clearly reflects that Mr. Clark argued that the stay period began on the date of the court's order and not on the date the appraisal was filed.

We have obtained the following affidavit from Mr. Clark, and are filing with this reply brief the sworn copy of said affidavit:

"*State of Nebraska, County of Holt—ss.*

GEORGE B. CLARK, upon being duly sworn and upon his oath, states that he was one of the attorneys in the District Court for Charles J. Mach in the case of Charles J. Mach v. The Abbott Company now pending before the United States Circuit Court of Appeals, Eighth Circuit, No. 12422—In Bankruptcy.

Affiant further states that he appeared for Charles J. Mach at the hearing on May 13, 1942, before the District Court and that he argued on that date before Judge Delehant the questions presented in his brief and argument as set out on pages 4, 5 and 6 of the appellant's petition for rehearing.

Affiant further states that he never argued or contended before the court that the stay order should begin on March 22, 1940, but at all times argued that the stay order should begin on the date of the court's order after an appraisal had been filed.

GEORGE B. CLARK.

Subscribed and sworn to before me this 13 day of July, 1943.

CLAIR GRIMES,
Notary Public.

My commission expires Jan. 27, 1947."

The above affidavit was filed in the Eighth Circuit Court of Appeals in support of our petition for rehearing, and that court ordered it stricken from the record. We have filed it again in this court as evidence that the District Court had before it the question as to whether the stay period began on the day of the court's order or on the date the approval was filed.

III.

Petitioner can attack in this court the void order of the District Court.

Respondent states that none of the cases cited by petitioner on page 18 and 19 of its petition involve bankruptcy proceedings and, therefore, should not be considered. No cases can be found involving bankruptcy proceedings on this point. Neither are any cases cited by the Court of Appeals and set out on page 24 of the respondent's brief involve a bankruptcy proceeding.

Respondent cites *In re McGoldrick*, 121 F. (2d) 746, as authority that the conditions required by the Bankruptcy Act need not be complied with before order of sale is entered. The record in that case does not disclose that an appraisal was requested by the debtor after he had been adjudicated a bankrupt under Sec. 75 (s) of the Act. Since no appraisal was requested, it therefore was not necessary for the court to follow the procedure when such an appraisal is requested. When such a request is made, it is, of course, essential that the court follow the prescribed procedure so that the estate can be conserved for the benefit of both the debtor or creditor. A request was made for an appraisal in the case at bar (R. 1) and the court ordered an appraisal made (R. 2).

In re Denney, 135 F. (2d) 184, is cited by respondent as authority that the debtor can waive the correct procedure. The record discloses in that case that the debtor, with his attorney, understandingly and voluntarily agreed to another procedure. No such fact appears in this case and it is clearly distinguishable.

Conclusion.

Throughout the respondent's brief are various statements questioning the good faith of the petitioner. It is asserted without specifying the record page, that the petitioner has not obeyed the orders of the court and that he is attempting to make a mockery of the courts and defeat the end of justice. It is stated that he waited two years to call the attention of the District Court (Br. 28) to the fact that no appraisal had been made, and then obtained the appraisal which he should have obtained over two years previously. These statements are without foundation and made to prejudice this court against the petitioner.

Respondent knows that the District Court ordered the appraisal, and the Circuit Court of Appeals in this connection said, "The debtor requested an appraisal in his petition to be adjudged a bankrupt, and it cannot fairly be said that it was his fault that the Conciliation Commissioner did not order a prompt appraisal" (R. 142, 143). Three times throughout the proceeding (R. 32, 55, 118) the respondent filed application and was denied leave to proceed with the foreclosure in the state court.

Respondents and its attorneys further knew that there had been no appraisal before March 22, 1940, and no proper orders after that date as required by Sec. 75 (s) (1) of the Bankruptcy Act. Nothing was done by them because they believed the court would end the three-year stay period on October 27, 1941, three years after the court's order on October 27, 1938.

In *Borchard* v. *California Bank, supra,* this court, on page 1225 of 84 L. Ed. 1225 and 318 of 310 U. S., clearly states that the creditor in that case was at fault in obtaining no action by the Conciliation Commissioner in accordance with the statute.

The record reflects that a disorderly and unauthorized procedure was followed in the District Court. The debtor requested an appraisal in his petition (R. 1), and the court ordered the Conciliation Commissioner to appoint three appraisers and make an appraisal (R. 2). No appraisal was made, but the court, nevertheless, made an order beginning the three-year stay order on October 27, 1938 (R. 36). An appraisal was filed, however, on March 22, 1940, by two appraisers instead of three (R. 40). A second appraisal was filed September 4, 1940. Neither the first nor second appraisal was approved by the Commissioner or Court, nor any orders as required by Sec. 75 (s) (1) made by the Commissioner or court. Then the District Court, in his order filed May 29, 1942, reversed the previous order starting the three-year stay order on October 27, 1938, and instead began it retroactively on March 22, 1940, the date the first appraisal was filed.

We submit that the procedure followed in this case was anything but orderly. Neither was a valid appraisal made by three appraisers as required by the court's order (R. 2), nor were orders after the appraisal made by the Commissioner as required by Sec. 75 (s) (1) of the Bankruptcy Act. Certainly, under such facts the District Court had no authority to enter his order May 29, 1942, retroactively beginning the stay order on March 22, 1940.

Respectfully submitted,

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